

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHARLES HADDAD,

Plaintiff,

vs.

Civil Action
No. 04-CV74932

INDIANA PACERS, an assumed name, a/k/a
PACERS BASKETBALL CORPORATION, an
Indiana corporation, JERMAINE O'NEAL and
Scheer

Hon. Anna Diggs Taylor
Mag. Judge Donald A.

ANTHONY JOHNSON, Jointly and Severally,

Defendants.

/

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PLAINTIFF'S RESPONSE TO DEFENDANT
JERMAINE O'NEAL'S MOTION FOR STAY OF PROCEEDINGS

NOW COMES Plaintiff, by and through his attorneys, CHARFOOS & CHRISTENSEN, P.C., and in response to Defendant Jermaine O'Neal's Motion for Stay of Proceedings, requests that this Honorable Court deny Defendant's motion for the reasons set forth in Plaintiff's Response and accompanying Brief.

Plaintiff relies on the accompanying Brief in Opposition.

WHEREFORE, Plaintiff respectfully requests that this Honorable Court deny Defendant O'Neal's Motion in its entirety.

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Dated: May 27, 2005

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Most Controlling Authority

1. *Baxter v. Palmigiano*, 425 U.S. 308; 96 S. Ct. 1551 (1976).
2. *United States of America v. Certain Real Property 566 Hendrickson Blvd.*, 986 F. 2d 1993 (6th Cir. 1993).

INTRODUCTION

Defendant O'Neal's Motion to Stay, like Defendant Johnson's Motion to Stay, assumes that defendants cannot be forced to proceed in a civil case while a criminal case is pending. The Sixth Circuit Court of Appeals has set out binding precedent that holds just the opposite. As a result, Plaintiff requests that this Honorable Court deny Defendant O'Neal's Brief in its entirety.

ARGUMENT

I. A DEFENDANT CAN BE REQUIRED TO PROCEED WITH CRIMINAL AND CIVIL LITIGATION SIMULTANEOUSLY

Defendant O'Neal contends that he should not be forced to choose between his fifth amendment right and the active defense of Plaintiff's claims. Defendant's contention, however, is nothing more than an expression of his opinion or preference; it is not a description of the state of the law in this jurisdiction.

The Sixth Circuit has held that federal law does not prohibit "...forc[ing] him to choose between preserving his Fifth Amendment privilege against self-incrimination and losing his civil suit." *United States v. Certain Real Property* 566 Hendrickson Blvd., 986 F.2d 990, 997 (6th Cir. 1993). The United States Supreme Court, in fact, has held that nothing in the Constitution or Federal law protects the defendant from the adverse inferences that are drawn when a defendant that invokes his Fifth Amendment rights.

Baxter v. Palmigiano, 425 U.S. 308, 316; 96 S. Ct. 1551 (1976). See also, *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 326 (9th Cir. 1994)(There is nothing wrong with forcing a defendant to choose between testifying in a civil matter and asserting the Fifth Amendment privilege).

Defendant O'Neal's case law correctly points out that the Defendant has the right to invoke his Fifth Amendment rights in this case. However, on page 7 of his Brief, Defendant O'Neal takes the argument one step further and suggests that the Fifth Amendment right "...requires a stay of these proceedings." Noticeably missing from this second argument is any legal support. The reason is clear. The Sixth Circuit has held that the Fifth Amendment is not a sufficient reason to stay a civil proceeding. *Certain Real Property 566 Hendrickson Blvd.*, 986 F.2d at 997. As a result, Defendant O'Neal's Motion to Stay should be denied in its entirety.

**II. IN THE EVENT THIS COURT DECIDED TO STAY
THIS PROCEEDING, THE STAY SHOULD NOT
EXTEND THE STAY PAST THE CRIMINAL TRIAL**

It is unclear from Defendant O'Neal's Motion whether he seeks to stay this case beyond the conclusion of his criminal trial. Defendant O'Neal should not be allowed to stay this case beyond his misdemeanor criminal trial. *Danesh v. City of Ann Arbor*, 517 F.Supp 86, 89-91 (E.D.Mich. 1981)(Civil action can promptly recommence even though criminal case is subject to appeal because Fifth Amendment concerns have passed).

Accordingly, in the event this Honorable Court stays this litigation, the stay should end after O'Neal's criminal trial and no later. At this point in time, Defendant's supposed Fifth Amendment concerns have ended, and any further delay simply gives the Defendant's strategic advantage to the detriment of the Plaintiff's right to have his day in court.

CONCLUSION

Defendant O'Neal has failed to provide any legitimate reason why this Honorable Court should stay this litigation. The Sixth Circuit has outright rejected defendant O'Neal's argument, and therefore, it lacks merit. Defendant O'Neal's Motion should be denied in its entirety.

CERTIFICATE OF SERVICE

I hereby certify that on May 27, 2005 my secretary electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to the following: Richard M. Apkarian; Steven M. Potter, and Hideaki Sano. I hereby certify that I have mailed by United States Postal Service the paper to the following non-ECF participants: Thomas W. Cranmer, 150 W. Jefferson, Suite 2500, Detroit, Michigan 48226 and Matthew F. Leitman, 840 W. Long Lake Road, Suite 200, Troy, Michigan 48098-6358.

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